UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD WASHINGTON, D.C.

MCCARTHY CONSTRUCTION COMPANY

Employer,

Case Nos.

7-CA-51474 7-CA-51647

and

CEMENT MASONS LOCAL 1, INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS (BAC), AFL-CIO

Charging Party

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RESPONDENT'S BRIEF ANSWERING CHARGING UNION'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

Respondent, McCarthy Construction Company, respectfully submits the following Answering Brief to the Charging Union's Exceptions to Administrative Law Judge Arthur J. Amchan's Decision.¹ Notably, the General Counsel has not taken exceptions to the ALJ's rulings.²

¹ The following abbreviations are sometimes used herein: Administrative Law Judge – ALJ; Administrative Law Judge's Decision – ALJD; Official Transcript – TR.

² In the Counsel for the General Counsel's Brief Answering Respondent's Exceptions, filed today, Counsel for the General Counsel makes the extraneous and entirely improper remark that he "agrees with the Charging Union's position with regard to their entitlement to the information in Respondent's possession with regard to Kensington Construction." Brief, pp. 1-2. The time for the General Counsel to take a position on the ALJ's ruling on this issue has long since past, and in light of the fact that the General Counsel purposefully decided <u>not</u> to join the Charging Union in filing exceptions precludes it from submitting an off-handed comment that Counsel for the General Counsel "agrees" with the Union's position. Respondent requests that the Board reject and ignore Counsel for the General Counsel's comments in this regard.

The Union raises two issues in its Exceptions, both of which concern the ALJ's conclusion that the Union did not have a reasonable objective basis for believing an alter ego relationship existed between Respondent and Kensington Construction Company ("Kensington"). The Union argues that it did establish a reasonable objective basis and that Respondent violated the Act by refusing to provide information concerning Kensington. For the following reasons, the ALJ properly concluded that the Union failed to meet its burden and dismissed the unwarranted 8(a)(5) allegation.

I. FACTS

Respondent and the Union met for bargaining on October 21, 2008, at which time the Union made a verbal request for documents pertaining to Kensington Construction Company, such as payroll records and documents concerning "who was running it" and "who was in control of it." TR 32-33. The Union said only that it "needed the information for negotiations." *Id.* On cross examination, Union representative Paul Dunford clearly testified that he recalled nothing else concerning why the information was needed. TR 73-74. Denise McCarthy, Respondent's Vice President of Operations, explained to the Union that Kensington was no longer in business. TR 139. This fact is undisputed.

On October 22, 2008 Devaney emailed Canzano, suggesting that the next meeting take place on October 27, 2008. ER-1. He explained that "in light of the additional information you requested yesterday and the background you provided on Kensington, I think it may be more productive for us to allow me to gather the additional information you requested and do some due diligence on the earlier fund litigation before we meet again." *Id*.

The "fund litigation" referenced by Devaney in his email was a 2004 lawsuit brought by the Union's benefits funds against Respondent and Kensington Construction in U.S. District

Court, Eastern District of Michigan, Case No. 04-cv-74006-DT. In that case, Judge Rosen issued an Opinion and Order Denying Plaintiffs' Motion for Summary Judgment, dated March 24, 2006. ER-4. In that case, the Union's funds alleged that Respondent and Kensington were alter egos. The federal court noted that the Sixth Circuit Court of Appeals has categorically rejected application of the alter ego doctrine in the inverse situation – i.e., where a nonunion company establishes a union company and no preexisting labor obligations are disrupted. ER-4, p. 4, citing Trustees of the Resilient Floor Decorators Insurance Fund v. A&M Installations, Inc., 395 F.3d 244 (6th Cir. 2005).

The federal court also ruled that, even if the alter ego doctrine could be applied to Respondent and Kensington, the relationship between the companies does not support a finding of alter ego status. The federal court ruled that:

McCarthy Construction and Kensington have different ownership, different business purposes, different officers, different phone numbers, different officers, and different management – and they do different work. The two companies maintain separate bank accounts, separate insurance policies, and do not share common equipment. Further, there is no evidence of intermingling of funds or assets. ER-4, p. 6.

The parties met for bargaining again on October 27, 2008. Devaney advised the Union that he was still reviewing the information request concerning Kensington. TR 34.

Because the Union never presented any information to support its alter ego theory, and because Respondent did not possess information requested by the Union, Respondent did not and could not provide the requested information. At the hearing before the ALJ, the Union was unable to articulate why, in the face of the fund litigation, information about Kensington was relevant. In his testimony, Respondent's counsel Dennis Devaney explained the basis for Respondent not providing information about the ownership, control and operation of Kensington:

A. Well, yeah, Mr. Canzano frequently alluded to the fact that, at least in his

view, he thought they were alter egos.

- Q. And that was not sufficient relevance in your
- A. How could it be under the Board's own rules? His assertion, and when there's a federal judge finding that they're not?

TR 195.

Union agent Dunford testified that he has never spoken to Mike McCarthy about Kensington Construction. TR 47. The Union verbally requested information about Kensington at the bargaining table, which it vaguely claimed was needed for "negotiations." The Union's counsel placed in writing its request on December 3, 2008, requesting that Respondent to provide information about the "current status of Kensington Construction Co., including its ownership, control, and current operations, if any." GC-15. Respondent made it clear to the Union that <u>it did not have the information about Kensington requested by the Union</u>. TR 203.

The Union, by way of comments made by its counsel, reflected its awareness at the hearing that it is required to establish a reasonable belief, based on objective evidence and not a concoction of some general theory, that information about Kensington is relevant. Dunford was the General Counsel's chief witness called to attempt to meet this burden. To this end, Dunford clearly overstated the facts in his testimony by claiming that "wherever McCarthy is, Kensington is. Wherever Kensington is, McCarthy is. They're side-by-side on every single job." TR 47-48 (emphasis added). When tested about this accusation on cross examination, however, it became clear that Dunford's basis for making the accusation is his contention that Eric Teichner is synonymous with Kensington. TR 93. Thus, in the Union's view, if Teichner is present at a McCarthy Construction job, then Kensington is necessarily also present on that job. The lengths Union agent Dunford went to in his trial testimony to advocate his position concerning Kensington were exemplified by his testimony at TR 100-101. Dunford was asked repeatedly,

by Respondent's counsel and the ALJ, whether he would presume that an alter ego relationship exists solely on the basis of a contractor and subcontractor working at the same site. Dunford clearly did not want to answer the straightforward question that was asked, for fear of conceding a point that he viewed damaging to the Union's position. Ultimately, Respondent's counsel stated that he would "take his answer" because his evasive responses proved the point: the facts were secondary to the Union's efforts to support its request of Respondent for information about a separate entity, Kensington. This was also clear from Dunford's admitted disregard for the recent fund litigation ruling by a federal court on alter ego allegations concerning Respondent and Kensington:

- Q. Okay. Now, did Judge Rosen's finding play any part in whether or not you believed that there was an alter ego relationship between McCarthy and Kensington in 2008?
- A. I can't say it did, no.
- Q. So, you didn't give that a second thought in basing your conclusion that there's an alter ego relationship here?

A. No.

TR 102.

Q. Okay, now, did you discuss with anyone at your union, at the time that you were formulating your information request concerning alter ego status, the fact that the Judge in this case found that McCarthy and Kensington had different ownership, different business purposes, different offices, different phone numbers, different officers, and different management, and they do different work? The two companies maintain separate bank accounts, separate insurance policies, and do not share common equipment. Further, there is no evidence of intermingling of funds or assets.

A. No.

TR 103-104.

Respondent's owner, Mike McCarthy, testified that on occasion he has contacted Kensington, which has furnished some employees to Respondent. The last time this happened

was a job at Somerset Mall in 2008. He explained that he has the same kind of relationship with other concrete companies that furnish Respondent with employees on occasion. A company called PWB furnishes Respondent with union carpenters or union operators, and a company called Select furnishes some laborers. Additionally, John Burby, a carpentry company, furnishes carpenters to Respondent and DJ Electric furnishes electricians. TR 235-236.

In its brief supporting its exceptions, the Union states that a worker named Arturo Ramirez was an employee of Kensington who voted in the NLRB McCarthy election as a member of the McCarthy bargaining unit. Union's Brief, p. 6. The Union intentionally and conveniently fails to mention that Ramirez voted under challenge by the Board because he was not on McCarthy's Excelsior list, and that, most importantly, the Board and Respondent stipulated to Ramirez's employment status for the R case proceeding only and the stipulation was not binding on the parties in any other procedure or proceeding. TR 95-97. At the hearing before the ALJ, the Union expended considerable effort discussing the employment of Ramirez. Mr. McCarthy testified that Ramirez is not an employee of Respondent, but was an employee approximately five or six years ago. TR 237. At all relevant times, Ramirez was an employee of Kensington, when it was in operation. McCarthy explained that when Ramirez worked on a McCarthy job site, he was compensated by Kensington. For example, the Somerset Mall job required Respondent to utilize union cement finishers. So, Respondent requested that Kensington (which had a contract with the Union) furnish a cement finisher for that job. Respondent paid Kensington an hourly rate for the work performed by Ramirez. Respondent had no further role in how Kensington paid Ramirez or any other employee. This payment arrangement was no different than the arrangements Respondent had with other companies like PWB, Select and Burby. TR 237-238.

Union agent Dunford emphasized in his testimony that he saw Kensington employees using power equipment owned by Respondent. McCarthy explained that this was "common practice. Whenever a union finisher is furnished by, whether by Paul Dunford or whoever, normally whoever the employees are sent to, whichever company, they usually use that company's equipment . . . It's just standard procedure." *Id*.

Additionally, McCarthy explained that on a job like the 2008 Somerset Mall job, it is common for Respondent's foremen to supervise workers on the job, including those of another company like Kensington. He testified that when Respondent has a contract, "it supervises all of its subcontractors, all of its employees. It has a – it's very important that we take care of quality control and performance on a job." TR 239.

II. ARGUMENT

A. The Union Did Not Meet The Burden Of Demonstrating Relevance of Information Pertaining To Kensington.

An employer's duty to bargain in good faith includes the duty to provide information that is needed by the bargaining representative for the proper performance of its duties, including information relevant to contract administration and negotiations. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-36 (1967). The question of whether particular information needs to be provided depends upon whether there is a probability that the desired information is relevant and will be of use to the representative in carrying out its statutory duties and responsibilities. *Bohemia, Inc.*, 272 NLRB 1128, 1129 (1984).

Respondent does not dispute that information concerning the terms and conditions of employment of bargaining unit personnel is presumptively relevant. *Rice Growers Assn.*, 312 NLRB 837, 838 (1993). However, as the Board stated in *Ohio Power Co.*, 216 NLRB 987, 991 (1975) (emphasis added):

[W]here the request is for information with respect to matters occurring outside the unit, the standard is somewhat narrower (as where the precipitating issue or conduct is the subcontracting of work performable by employees within the appropriate unit) and relevance is required to be somewhat more precise.... The obligation is not unlimited. Thus where the information is plainly irrelevant to any dispute there is no duty to provide it.

Thus, when information requested concerns matters outside the bargaining unit, the burden is on the union to demonstrate relevance. *Shoppers Food Warehouse*, 315 NLRB 258 (1994); *Reiss Viking*, 312 NLRB 622, 625 (1993). Information regarding the existence of an alter ego or double-breasted operation is not presumptively relevant. *C.E.K. Industrial Mechanical Contractors*, 295 NLRB, 635, 637 (1989), *enf. denied on other grounds* 921 F.2d 350 (5th Cir. 1990).

In these circumstances, a union must show that there is a "logical foundation and a factual basis for its information request." *Postal Service*, 310 NLRB 391 (1993). "The showing by the union must be more than a mere concoction of some general theory which explains how the information would be useful to the union in determining if the employer has committed some unknown contract violation. Otherwise, the Union would have unlimited access to any and all data which the employer had." *Southern Nevada Builders Assn.*, 274 NLRB 350, 351 (1985). In *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 314 (1979), the Supreme Court held that "[a] union's bare assertion that it needs information to process a grievance does not automatically oblige the employer to supply all the information in the manner requested."

A union must show that it has a reasonable belief, supported by objective evidence, that the requested information is relevant. *Knappton Maritime Corp.*, 292 NLRB 236, 238-239 (1988). Further, "a union must do more than cite a provision of the collective-bargaining agreement. It must demonstrate that the contract provision is related to the matter about which

information is sought, and that the matter is within the union's responsibilities as the collective-bargaining representative." *Disneyland Park*, 350 NLRB 1256 (2007).

In order to establish the relevance of information pertaining to the ownership, control and current operations of Kensington, the union must demonstrate a reasonable objective basis for believing that an alter ego relationship exists. *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994) ("a reasonable belief supported by objective evidence"). Additionally, Respondent is under no duty to compel another company like Kensington to provide answers to the Union's information requests. *Pittston Coal Group*, 334 NLRB 690 (2001).

Unlike any other Board case found by Respondent's counsel in its legal research, this case is unique in that a federal court had previously considered and rejected the same alter ego allegation. A determination whether the Union had a reasonable belief based on objective evidence must be viewed against the backdrop of the 2006 federal court ruling, which the Union knew about at the time it requested information about Kensington. The ALJ properly relied upon the ruling, and the Sixth Circuit case law cited therein, to conclude that the Union could not articulate a theory under which it would have a reasonable objective basis to believe an alter ego relationship existed.

B. The ALJ Properly Concluded That Under Board Law As Well As Sixth Circuit Law, The Union Did Not Have A Reasonable Objective Basis For The Information Request.

The Union argues that the ALJ improperly relied upon *Resilient Floor*, which was cited by the federal court in the 2006 fund litigation. The Union asserts that *Resilient Floor* is not controlling precedent in the Sixth Circuit. This assertion, however, is plainly wrong. The Union's citation to unpublished district court decisions that distinguish *Resilient Floor* does not change the fact that it is controlling law and was relied upon in the fund litigation. Of course, a

published district court decision (the fund litigation decision) expressly applied *Resilient Floor*. More importantly, the ALJ based his decision not only on the principles discussed in the 2006 fund litigation decision and *Resilient Floor*, but also on prevailing Board law. ALJD, p. 7. In this case, the Union makes no claim that Respondent established a union company which disrupted preexisting labor obligations. The ALJ's reasoning is particularly compelling based on the facts of this case. The Union articulated no basis for believing that Kensington, a company it has or had a collective bargaining relationship with, was "established" by Respondent and that the Union was somehow worse off because of the alleged relationship. This is not like the customary alter ego scenario where a union company establishes a nonunion company, thereby negatively affecting the union. The Union in this case truly has no objective basis to believe that Respondent created or maintains a relationship with a defunct organization whose employees the Union already represented. The Union simply tossed out a few instances where Kensington did work on a McCarthy job, and cried "alter ego." The reasons for making that allegation were shallow to begin with, and were even more unconvincing in light of the fund litigation decision.

The Union knew at the time of its information request that a federal judge had ruled that Respondent and Kensington had "different ownership, different business purposes, different officers, different phone numbers, different officers, and different management – and they do different work. The two companies maintain separate bank accounts, separate insurance policies, and do not share common equipment. Further, there is no evidence of intermingling of funds or assets." Thus, for its belief to be reasonable based on objective evidence, the Union had to identify some additional reason to believe that circumstances were so different between 2006 and 2008, that it should disregard the federal court ruling. The Union failed to do so, of course, and the ALJ properly rejected this allegation.

Again, Union agent Dunford made it clear in his testimony that he did not give the federal court ruling a second thought in considering its information request. He willfully ignored a detailed ruling by a federal judge on this very issue, and instead claimed he needed information about Kensington "for negotiations." The Union also disregarded the fact that Kensington is no longer in operation, a fact that appears to have been caused, at least in part, by this Union refusing to provide any further employees to Kensington. TR 224, 230. Purportedly, the Union's primary basis for believing an alter ego relationship exists between Respondent and Kensington is that Dunford "saw" Kensington on "every single" McCarthy job, and that a Kensington employee used a "power trowel" owned by McCarthy while working on that job. Mike McCarthy testified without contradiction, however, that Dunford was simply wrong. Prior to Kensington going out of business, there were one or two instances where it furnished a union cement finisher on a McCarthy job. The fact that this union cement finisher may have used Respondent's power equipment was completely unremarkable and in fact happens all the time with other companies who furnish employees to Respondent for a particular job.

In view of all the facts, it is clear that the Union based its alleged "reasonable belief" on the flimsiest of evidence. The Union saw Arturo Ramirez at the Somerset Mall job, but he was there as a Kensington-furnished cement finisher because it was a union worksite. The Union saw Eric Teichner, a McCarthy supervisor, at various McCarthy jobs and concluded that Kensington was present on the job, because of Dunford's plainly erroneous view that Teichner is Kensington. The Union saw Respondent's foreman overseeing the work of Ramirez, but McCarthy's unrebutted testimony established that it is standard practice for Respondent to oversee all work done by its employees and those employees furnished by a third party. These instances of alleged interrelationship do not provide a reasonable objective basis for the Union's

request.

The Union's purpose for making these allegations is to pave the way for wide-ranging

information requests for business records and financial information from Respondent under the

guise of inquiring about an "alter ego." This is precisely the outcome the Board refuses to permit

by imposing on the Union the burden to provide more than a general theory, "Otherwise, the

Union would have unlimited access to any and all data which the employer had." Southern

Nevada Builders Assn., 274 NLRB 350, 351 (1985).

In light of the particularized ruling in 2006 by a federal judge that Respondent and

Kensington exhibit absolutely no characteristics of having an alter ego relationship, and

considering the serious shortcomings in the Union's claim of "reasonable belief" of such a

relationship, the ALJ correctly determined that Respondent did not violate the Act by refusing to

produce information about Kensington – information that it undisputedly does not possess.

III. CONCLUSION

For the reasons set forth above, the Board should uphold the ALJ's conclusion that

Respondent did not violate Section 8(a)(5) by refusing to produce clearly irrelevant information

about Kensington.

Respectfully submitted,

STROBL & SHARP, P.C.

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Dated: July 29, 2009

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ECF Certificate of Service

I hereby certify that on July 29, 2009, I electronically filed the foregoing Answering Brief with the Executive Secretary of the National Labor Relations Board using the ECF system. I hereby further certify that I have also served via email Richard F. Czubaj, Counsel for the General Counsel and John Canzano, Charging Union's Counsel.

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